No. 98-828

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HOME BOY 2000,

Petitioner,

—v.—

GUESS?, INC., GUCCI AMERICA, INCORPORATED, and BIG TIME JEWELRY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT GUESS?, INC. IN OPPOSITION

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Counter Statement of Questions Presented

Since Petitioner Home Boy 2000 ("Home Boy") materially mischaracterizes the nature of the Second Circuit's decision upon which a writ of certiorari is sought, Guess? Inc. ("Guess?") respectfully restates the questions presented as follows:

Whether the Second Circuit's reversal of the lower court on the sole legal ground that it misapplied governing Second Circuit precedent on the standards for vacating a judgment pursuant to Fed. R. Civ. P. 60(b)(1) is of significant importance to warrant this Court's review?

Whether there is a split in the Circuits supporting this Court's granting of the Petition?

Supplemental Statement of the Parties

Pursuant to Rule 29(6), Guess? certifies that it has no parent companies or nonwholly owned subsidiaries.

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IN THE

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No. 98-828

HOME BOY 2000,

Petitioner,

—v.—

GUESS?, INC., GUCCI AMERICA, INCORPORATED, and BIG TIME JEWELRY,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT GUESS?, INC. IN OPPOSITION

Summary of Argument

Guess? respectfully requests that Home Boy's petition for a writ of certiorari be denied. Throughout its Petition, Home Boy emphasizes that the appellate court erred in failing to give proper cognizance of the equities of the case, and thereby abused its discretion in doing so.

This mischaracterizes the ground upon which the appellate court reversed the district court. The Second Circuit did not hold that the district court abused its discretion under Fed. R. Civ. P. 60(b) in vacating the judgment. Rather, the appellate

court properly performed a *de novo* review of the law applied by the district court, and reversed on the ground that the trial court misapplied governing law. The decision applied the plain language of the Rule, clearly not presenting a substantial question worthy of this Court's review.

Second, Home Boy finds a split in the Circuits where there is none. Only by mischaracterizing the decisions relied upon is an artificial 'split' created among these decisions.

Counter-Statement of the Case

A. Proceedings in the Trial Court

The facts relevant to this Petition are simple: Home Boy was served with a complaint alleging counterfeiting violations of the Trademark Act of 1946, § 1051 et. seq., in particular, §§ 1114(1) and 1125(a), and violations of common law trademark infringement and unfair competition. Home Boy defaulted. The district court entered a default judgment including a permanent injunction against Home Boy, and granted Guess? the right to conduct discovery relating to damages and thereafter to submit a brief in support of the damages requested. Guess?'s brief, exceeding 200 pages (including exhibits), was served on Home Boy, and again Home Boy failed to respond. The district court granted Guess?'s damages request, and subsequently authorized Guess? to execute on the monetary portion of the judgment.

Only after Home Boy's assets were seized in satisfaction of the judgment did Home Boy appear, through counsel, seeking to vacate the monetary provisions of the judgment pursuant to Fed. R. Civ. P. 60(b)(1). After hearing Home Boy's motion, the trial court found that Home Boy's principal:

> deliberately and willfully defaulted in this action, and, moreover, deliberately obstructed its progress at the depositions [on damages]. Although he has not sought to reopen the default as to liability and injunctive relief,

> this finding would have led the Court to deny any such application.

Gucci America Inc. v. Gold Center Jewelry, 997 F. Supp. 399, 408 (S.D.N.Y.), *amended sub nom. Guess?, Inc. v. Gold Center Jewelry*, 997 F. Supp. 409 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 158 F.3d 631 (2nd Cir. 1998).

As to the damages granted, however, the trial court vacated that aspect of the default judgment. The court reasoned:

> [Home Boy's principal] concededly was served with the [damages brief] and *ignored it*. As a legal matter, he was on notice of the relief sought against him. Having considered his demeanor and all of the evidence of this case, however, the Court is not persuaded that his failure to respond to that application was the product of *bad faith*. And while it was *deliberate* in the sense that [Home Boy's principal] *made a conscious decision to pay no attention to it and not to seek legal advice*, the Court is satisfied that this was more a product of *stupidity* than of *malice*.

997 F. Supp. at 409 (emphasis added).

B. The Appellate Court Decision

The Second Circuit reversed the lower court's decision insofar as it erred in granting Home Boy's motion to vacate the damages award, and remanded the case to reinstate the award originally granted Guess?. 158 F.3d 631, 1998 U.S. App. LEXIS 24488 (2nd Cir. 1998).

The basis for the appellate court's decision was that the district court misapplied the test set out in *American Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57 (2nd Cir. 1996), its leading decision analyzing the appropriate standards for vacating a default pursuant to Rule 60(b)(1), by incorporating a bad faith requirement into wilfulness. According to the appellate court, *American Alliance* prohibits the vacatur of a default

judgment when the defaulting party acts willfully without regard to whether the defaulting party acted in bad faith. In its ruling, the appellate court stated:

> It seems to us clear that the analysis in *American Alliance* did not intend to suggest that a finding of bad faith is a necessary predicate to concluding that a defendant acted "willfully" for purposes of Rule 60(b)(1). Instead, we merely sought to contrast defaults caused by negligence, which in some cases may be excusable, with defaults resulting from deliberate conduct, which are not excusable. . . . Thus, while a determination that the defendant acted in bad faith would certainly support a finding of "willfulness," it is sufficient that the defendant defaulted deliberately. . . .
>
> Since the trial court here incorrectly required bad faith as a predicate to a determination of willfulness and since the record reflects that Home Boy . . . deliberately and intentionally allowed [a] default judgment[ ] to enter against [it], we reverse and order reinstatement of the original monetary judgment[ ].

158 F.3d 631, __, 1998 U.S. App. LEXIS 24488, **11-13 (citations omitted).

In short, predicating its decision on the trial court's own findings, the judgment was reversed because of the trial court's misapplication of the law.

Reasons for Denying the Writ

POINT I

THE APPELLATE COURT'S DECISION WAS AN UNEXCEPTIONAL INTERPRETATION OF A FEDERAL RULE OF INSUFFICIENT IMPORTANCE TO GRANT REVIEW OF ITS DECISION

The gravamen of Home Boy's Petition is that the Second Circuit "abused its discretion" in reversing the trial court's decision. *See, e.g.* Petitioner's Brief, at 2 ("The Second Circuit's decision holds that the District Court abused its discretion by granting equitable relief . . ."); *id.* at 7 ("While defaults should certainly not be encouraged, fundamental principles of fairness dictate that the accepted and usual course of judicial proceedings be that District Court judges deal with default judgments as discretionary matters.")

This is a mischaracterization of the appellate court's holding. The Second Circuit held that, as a matter of law, the district court misapplied the test set out in *American Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57 (2nd Cir. 1996): "A district court's grant or denial under Rule 60(b), unless rooted in an error of law, may be reversed only for an abuse of discretion. . . . *We conclude that the decision here involved an error of law.*" 158 F.3d 631, __, 1998 U.S. App. LEXIS 24488, *9 (2nd Cir. 1998) (emphasis added; quotations and citations omitted).

The Second Circuit thus merely followed the plain wording of Fed. R. Civ. P. 60(b)(1), which allows a court to vacate a judgment because of "mistake . . . or excusable neglect," unexceptionally holding that a deliberate and willful default does not constitute a "mistake" or "excusable neglect"—a holding not only consistent with the plain wording of the Rule, but a holding consistent with all courts' long-standing interpretation of the Rule. *See generally* 12 J.W. Moore,

Moore's Federal Practice §§ 60.41[1][c][i] & n.13 (3rd ed. 1998) ("Deliberate or willful conduct is never mistake or excusable neglect"; cases collected).

In short, the Second Circuit's ruling—a straightforward and plain reading of Fed. R. Civ. P. 60(b)(1)—does not create a significant legal issue worthy of this Court's consideration.

POINT II

THERE IS NO SPLIT IN THE CIRCUITS SUFFICIENT TO JUSTIFY REVIEW

Home Boy's argument that there is a split in the Circuits is erroneous.

Home Boy relies upon a Seventh Circuit decision, *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354 (7th Cir.), *reh'g en banc denied*, 1997 U.S. App. LEXIS 24819 (7th Cir. 1997), for the proposition that *Robb* conflicts with the Second Circuit's decision. It does not.

In the first instance, Petitioner (at page 8) quotes *Robb*'s statement that "District Court judges [have] '*discretion* to consider the equities to determine whether . . . negligence is (or is not) excusable neglect.' " 122 F.3d at 359 (emphasis in original). But this statement is entirely in accord with the Second Circuit's decision, which, as quoted above, recognizes the discretion of the trial court in addressing Rule 60(b)(1) applications. As well, the issue before the Second Circuit was *not* whether "negligence" constitutes "excusable neglect," but rather whether a lack of bad faith excuses willful, deliberate defaults.

Further undercutting Home Boy's position, the *Robb* decision *itself* stated, "By following *Pioneer* [507 U.S. 380 (1993), discussed directly below] in a clear and straightforward fashion, we join the other circuits that acknowledge 'excusable neglect' has a new and broader meaning in the

aftermath of the Supreme Court's 1993 decision. See . . . *United States v. Hooper*, 9 F.3d 257, 258 (2nd Cir. 1993) . . ." *Robb*, 122 F.3d at 361-62. The Seventh Circuit thus expressly indicated that it was in *agreement*, not in conflict, with Second Circuit law.

Finally, in an effort to demonstrate that the Second Circuit's decision is in conflict with this Court's *Pioneer* decision, Home Boy, once again relying upon its erroneous emphasis on abuse of discretion, states:

> This Court's decision in the *Pioneer* case strongly indicates that the decision to vacate a default under Fed. R. Civ. P. 60 is particularly discretionary and that such discretion includes consideration of any equity created by the default and resulting judgment, even if "a party may *choose* to miss a deadline." 507 U.S. at 388.

Petitioner's Brief, at 8 (emphasis not in original).

This isolated quotation from *Pioneer* is misleading. What this Court said was:

> There is, of course, a range of explanations for a party's failure to comply with a court ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforseen human intervention. *At the other, a party simply may choose to flout a deadline.* In between lie cases where a party may choose to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

507 U.S. at 387-88 (emphasis added).

Nothing in this Court's discussion supports the proposition that the Second Circuit "took the exact opposite approach." Petitioner's Brief, at 8. The district court's own findings—

uncontested on appeal—was that the Petitioner "ignored" the brief on damages served on him, and "made a conscious decision to pay no attention to it and not to seek legal advice." 997 F. Supp. at 409. Indeed, the district court's findings, undisturbed on appeal, support the conclusion that Home Boy "simply . . . [chose] to flout a deadline." *Pioneer*, 507 U.S. at 388.

Yet again, Petitioner conflates the standards for appellate review: the Second Circuit did not hold that the district court abused its discretion in vacating the judgment; rather, it held that it misapplied the law—law which is entirely consistent with *Pioneer* and *Robb*.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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